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Mahabuilders Bhd v Hotel Rasa Sayang Sdn Bhd

HIGH COURT (JOHOR BAHRU) — SUMMONS NO 22NCVC-486–11 OF 2012
ABDUL RAHMAN SEBLI J
25 FEBRUARY 2014

Contract — Contractual terms — Incorporation of new terms — Agreement to enter into sale and purchase agreement of land — Draft agreement forwarded and returned between parties — Insertion of new clause — New terms not and never accepted — Draft agreement canceled and deposit cheque returned — Whether there was concluded contract between parties — Whether inclusion of clause to draft agreement counter offer

The plaintiff and the defendant had agreed to enter into a sale and purchase agreement ('SPA') in respect of a piece of land at the purchase price of RM19m. The plaintiff had paid a deposit of RM1.9m and a cheque was issued in the name of the defendant but was never banked in by the defendant. It was returned to the plaintiff as it was alleged that the cheque could only be released to the defendant upon execution of the sale and purchase agreement by both parties. That never happened as no agreement was executed between the parties on terms and conditions that had been mutually agreed upon. In pursuance of the parties' desire to enter into the SPA, the defendant forwarded a draft SPA by e-mail to the plaintiff's solicitors. The draft agreement was returned by the plaintiff on the following day for 'comments' but not before inserting a new cl 3A which consisted of four entirely new terms broken down into 15 sub-clauses. It included giving the plaintiff a wide power of attorney including powers of conversion and sub-division of the defendant's land as well as its management, improvement and development other than the removal of caveats and delivery of documents. The new terms were not and were never accepted by the defendant at any material time. Having rejected the additional terms, the defendant proceeded to cancel the draft agreement and returned the cheque deposit of RM1.9m to the plaintiff. The plaintiff's contention was that the defendant had no right to do so as there was already a concluded contract between the parties. The defendant contended otherwise, arguing that no contract had existed as the plaintiff had qualified its acceptance of the offer. The issues that arose were whether the plaintiff and the defendant had reached a final and concluded contract for the sale and purchase of the said land on terms and conditions agreed by both parties; whether the defendant could withdraw from the sale and purchase agreement after the defendant had received and kept the deposit cheque of RM1.9m from the plaintiff for one month when the defendant did not agree with the inclusion of cl 3A by the plaintiff; and whether the inclusion of cl 3A to the draft agreement was a counter offer by the

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plaintiff, giving the defendant a ground for canceling the proposed sale and purchase agreement. A

Held, dismissing the claim with costs:

(1) An offer was made only once while the rest were counter offers. The defendant's offered to sell the piece of land to the plaintiff on terms and conditions contained in the draft SPA prepared by the defendant's solicitors. At the outset that the plaintiff's acceptance of the proposal was not absolute as it was conditional upon the defendant agreeing to the new cl 3A. There could be no argument that cl 3A was a material variation from the draft agreement, which at any rate was more substantial than the variation (see para 15). B C

(2) By introducing the new cl 3A, the plaintiff was in fact making a counter offer, thereby reversing its role from being offeree to that of an offeror. It was the defendant's call whether to accept the counter proposal, conditionally or absolutely. If the defendant were to accept the plaintiff's counter proposal it would be a contract on terms offered by the plaintiff. As the defendant did not accept the counter proposal, it was no longer bound by the terms of the original offer (see para 16). D E

(3) The defendant had no duty to inform the plaintiff that it was not agreeable to the new terms. Neither was the defendant obliged to comment on the new terms. It was the plaintiff's duty if at all to obtain the defendant's assent before inserting the proposed cl 3A in the draft sale and purchase agreement. An offeree is not at liberty to add fresh terms to the offer at his whim and fancy. He does so at his own peril. The original offer was therefore revocable at the defendant's option. As the defendant's offer had been nullified by the plaintiff's counter offer the contract could not be revived on original terms by withdrawing the conditional acceptance (see para 21). F G

[Bahasa Malaysia summary

Plaintif dan defendan telah bersetuju untuk memasuki satu perjanjian jual beli ('PJB') berkenaan sebidang tanah pada harga belian sebanyak RM19 juta. Plaintif telah membayar deposit sebanyak RM1.9 juta dan telah mengeluarkan cek atas nama defendan tetapi tidak pernah disimpan di dalam bank oleh defendan. Ia telah dipulangkan kepada plaintif atas dakwaan bahawa cek tersebut hanya boleh dilepaskan kepada defendan sewaktu pelaksanaan perjanjian jual beli oleh kedua-dua pihak. Memandangkan itu tidak pernah berlaku kerana tiada perjanjian telah dilaksanakan antara pihak-pihak pada terma dan syarat yang telah dipersetujui bersama. Menurut keinginan pihak-pihak untuk memasuki PJB, defendan telah menghantar draf PJB melalui e-mail kepada peguamcara plaintif. Draf perjanjian tersebut telah dikembalikan oleh plaintif pada keesokan harinya untuk 'comment' tetapi H I

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tidak sebelum memasukkan klausa baru 3A yang mengandungi empat terma baru yang dibahagikan kepada 15 lagi sub-klausa. Ia termasuk memberi plaintif surat kuasa wakil yang luas termasuk penukaran kuasa dan sub-bahagian tanah defendan dan juga penyelenggaraan, pembaharuan dan pembangunan selain dari pemotongan kaveat dan penyerahan dokumen-dokumen. Terma-terma baru tidak dan tidak pernah diterima oleh defendan pada sebarang waktu material. Dengan menolak terma-terma tambahan, defendan meneruskan untuk membatalkan draf perjanjian dan memulangkan cek deposit sebanyak RM1.9 juta kepada plaintif. Hujahan plaintif adalah bahawa defendan tidak mempunyai hak untuk berbuat demikian kerana sudah terdapat perjanjian antara pihak-pihak. Defendan menghujahkan sebaliknya, mendebatkan bahawa tiada kontrak wujud memandangkan plaintif telah memberikan komen bagi syarat penerimaan tawaran. Isu yang timbul adalah sama ada plaintif dan defendan telah mencapai kata putus dan memasuki kontrak bagi jual beli tanah tersebut pada terma dan syarat yang dipersetujui oleh kedua-dua pihak; sama ada defendan boleh menarik diri daripada perjanjian jual beli selepas defendan menerima dan menyimpan cek deposit sebanyak RM1.9 juta daripada plaintif selama sebulan bila defendan tidak bersetuju dengan kemasukan klausa 3A oleh plaintif; dan sama ada kemasukan klausa 3A pada draf perjanjian merupakan tawaran balas oleh plaintif, memberikan defendan alasan untuk membatalkan perjanjian jual beli yang dicadangkan.

Diputuskan, menolak tuntutan dengan kos:

(1) Tawaran hanya dibuat sekali manakala yang lainnya adalah tawaran balas. Defendan menawarkan untuk menjual sebidang tanah kepada plaintif atas terma dan syarat terkandung dalam draf PJB yang disediakan oleh peguamcara defendan. Pada peringkat awal penerimaan plaintif kepada tawaran adalah tidak mutlak kerana ia bersyarat atas persetujuan defendan kepada klausa baru 3A. Tidak akan ada hujah bahawa klausa 3A adalah perubahan material dari draf perjanjian, yang pada mana-mana kadar adalah lebih substansial dari perubahan (lihat perenggan 15).

(2) Dengan memperkenalkan klausa baru 3A, plaintif sebenarnya membuat tawaran balas, dengan itu menterbalikkan peranannya dari seorang penerima tawaran kepada pembuat tawaran, bersyarat atau sepenuhnya. Sekiranya defendan menerima tawaran balas plaintif ia akan menjadi kontrak atas terma yang ditawarkan oleh plaintif. Memandangkan defendan tidak menerima tawaran balas, ia tidak lagi terikat dengan terma tawaran asal (lihat perenggan 16).

(3) Defendan tidak mempunyai kewajipan untuk memaklumkan kepada plaintif bahawa dia tidak bersetuju dengan terma-terma baru. Tidak juga defendan perlu untuk mengulas terma-terma baru. Ia adalah tanggungjawab plaintif sekiranya ada untuk mendapatkan persetujuan

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defendan sebelum memasukkan klausa 3A yang dicadangkan dalam draf perjanjian jual beli. Seorang penerima tawaran tidak mempunyai kebebasan untuk menambah terma-terma baru sesuka hati. Dia berbuat demikian atas risiko sendiri. Tawaran asal oleh itu boleh dibatalkan atas pilihan defendan. Oleh kerana tawaran defendan telah dibatalkan oleh tawaran balas plaintif kontrak itu tidak boleh dipulihkan dengan terma-terma asal dengan menarik balik penerimaan bersyarat (lihat perenggan 21).]

Notes

For cases on incorporation of new terms, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4121–4123.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754, SC (refd)
CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin [2010] 9 MLJ 176, HC (refd)
Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327, FC (refd)
Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah [2007] 2 MLJ 746, CA (refd)
Hyde v Wrench (1840) 3 Beav 334 (refd)
Lai Kok Kit @ Sulaiman Lai bin Abdullah v MBf Finance Bhd [2000] 3 MLJ 136, CA (refd)
Malayan Flour Mills Bhd v Saw Eng Chee (administrator of the estate of Saw Cheng Chor, deceased) & Anor [1997] 1 MLJ 763, HC (refd)
Tan Chee Hoe & Anor v Ram Jethmal Punjabi [1983] 2 MLJ 31 (refd)

Legislation referred to

Contracts Act 1950 s 7(a)

L Parthiban (L Parthiban, Zulkiflee & Associates) for the plaintiff.
Wong Kim Fatt (Wong Boon Chong with him) (Gulam & Wong) for the defendant.

Abdul Rahman Sebli J:

[1] The plaintiff's claim is for specific performance of an agreement for the sale and purchase of a piece of land together with the building erected thereon known as Lot 20952 Geran 437503 Township of Johor Bahru ('Lot 20952') which was aborted. The building that stands on Lot 20952 is the defendant, Hotel Rasa Sayang Sdn Bhd. At the conclusion of the trial I dismissed the plaintiff's claim with costs. The central and determinative issue is whether by adding new terms to the draft sale and purchase agreement the plaintiff had abrogated the defendant's offer, leading to a failure of acceptance within the

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meaning of s 7(a) of the Contracts Act 1950 ('the Contracts Act'). This is elementary contract law.

[2] I do not propose to deal with the testimonies of the witnesses called by both sides as the agreed facts are sufficient to cover all the agreed issues for determination. Their testimonies do not add anything new to the facts that are necessary for this purpose. The agreed facts are as follows. The plaintiff and the defendant are both companies incorporated under the Companies Act 1965. They had agreed to enter into a sale and purchase agreement in respect of Lot 20952. The agreed purchase price was RM19m and the plaintiff had paid a deposit of RM1.9m towards the purchase price. A cheque for that sum was issued in the name of the defendant but was never banked in by the defendant. It was returned to the plaintiff's solicitors on 12 April 2012 by the defendant's solicitors. It is common ground that this cheque could only be released to the vendor defendant upon execution of the sale and purchase agreement by both parties. That never happened as no agreement was executed between the parties on terms and conditions that had been mutually agreed upon.

[3] The dispute arose this way. In pursuance of the parties' desire to enter into the sale and purchase agreement the defendant' solicitors forwarded a draft sale and purchase agreement by e-mail to the plaintiff's solicitors Messrs SC Teh & Azura on 6 April 2012. The following day the plaintiff's solicitors returned the draft agreement to the defendant's solicitors by e-mail for 'comments' but not before inserting a new cl 3A. This clause consisted of four entirely new terms broken down into 15 sub-clauses which added eight extra pages to the original draft sale and purchase agreement. It included giving the plaintiff a wide power of attorney including powers of conversion and sub-division of the defendant's land as well as its management, improvement and development other than the removal of caveats and delivery of documents.

[4] The new terms were not and were never accepted by the defendant at any material time. Of particular objection to the defendant was para 3A.3 which required the defendant to deliver to the plaintiff's solicitors the following documents within 14 days:

(a) vendor's Forms 24, 44, 49, memorandum and articles of association (certified true copies);

(b) vendor's shareholders' and directors' resolution resolving that the vendor do sell to the purchaser the property at the purchase price and upon the terms and conditions contained in the agreement (certified true copies or extract);

(c) issue document of title to the property (photocopy);

(d) discharge of charge to discharge the legal charge under Presentation No

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31265/1996 *Jilid* 3598 Fol 74 dated 21 May 1996 favouring OCBC Bank (M) Bhd (certified copies);

(e) withdrawal of private caveat for the private caveat by Orex Point Sdn Bhd under Presentation No 6773/2008 dated 7 March 2008 (certified true copies);

(f) withdrawal of private caveat for the private caveat by Sharikat Johor Tenggara Sdn Bhd under Presentation No 21607/2009 dated 1 July 2009 (certified true copies);

(g) withdrawal of private caveat for the private caveat by Chua Ho Seng under Presentation No 8878/2011 dated 21 March 2011 (certified true copies);

(h) presentation receipt issued by the land registry for the documents stated in cll 3B.1.4–3B.1.7 herein above (certified true copies); and

(i) quit rent and assessment for the current year (certified true copies).

[5] Having rejected the additional terms the defendant proceeded to cancel the draft agreement and returned the cheque deposit of RM1.9m to the plaintiff's solicitors. The plaintiff's contention is that the defendant had no right to do so as there was already a concluded contract between the parties. The defendant contended otherwise, arguing that no contract had existed as the plaintiff had qualified its acceptance of the offer.

[6] The agreed issues to be tried are as follows:

(a) whether the plaintiff and the defendant had reached a final and concluded contract for the sale and purchase of Lot 20952 on terms and conditions agreed by both parties;

(b) whether the defendant can withdraw from the sale and purchase agreement after the defendant had received and kept the deposit cheque of RM1.9m from the plaintiff for one month when the defendant did not agree with the inclusion of cl 3A by the plaintiff; and

(c) whether the inclusion of cl 3A to the draft agreement is a counter offer by the plaintiff, giving the defendant a ground for cancelling the proposed sale and purchase agreement.

[7] All three issues are intertwined and related to the question whether the inclusion of cl 3A by the plaintiff amounted to a counter offer and if so whether it had the effect of nullifying the proposal made by the defendant. As to the question of whether cl 3A is a counter offer the plaintiff admits in paras 5 and 6 of the statement of agreed facts that it was a counter offer. The plaintiff is therefore bound by the agreed facts: *CH Choo & Sons Sdn Bhd v Wong Nyuk*

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Shing @ Wong Teck Tsin [2010] 9 MLJ 176. The issue must therefore be decided on the premise that cl 3A is a counter offer by the plaintiff. Even without the admission it is clear that cl 3A is a counter offer.

[8] What in law is meant by an offer? In GH Treitel's *The Law of Contract* (6th Ed), learned authors explained the meaning as follows at p 8:

> An offer is an expression of willingness to contract on certain terms made with the intention (actual or apparent) that it shall become binding as soon as it is accepted by the person to whom it is addressed. It may be made expressly or by conduct and may be addressed either to an individual, or to a group of persons, or to the world at large.

[9] Next comes the question when does an offer or a proposal (they mean the same thing) turn into a promise binding on the offeror?

[10] The answer is in s 7(a) of the Contracts Act which provides as follows:

> 7 Acceptance must be absolute.
>
> In order to convert a proposal into a promise the acceptance must —
>
> (a) be absolute and unqualified;

[11] The word 'absolute' is not defined by the Contracts Act but the *Oxford Dictionary of Law* (7th Ed), defines it to mean 'complete; unconditional; not relative or qualified'. The Contracts Act is modeled on the Indian Contract Act of 1872 and s 7 of both Acts are in pari materia. In Pollock and Mulla on the *Indian Contract and Specific Relief Acts* (12th Ed), Vol 1 Butterworths 2001 learned authors have this to say on absolute and unqualified acceptance at p 199:

> A valid acceptance of proposal must be absolute and unconditional. It must extend to all terms of a proposal. If the purported acceptance is conditional or qualified, it does not create a contractual relationship. It becomes a counter proposal, which may become a contract on the terms offered by the offeree if the proposer accepts it. Such an acceptance would revoke the offer, and the contract cannot be revived on original terms by withdrawing the conditional acceptance. A bid can be revoked by notice if it has been accepted provisionally or with conditions.

[12] At p 202 under the heading 'COUNTER-PROPOSAL' learned authors went on to say:

> An acceptance with a variation in terms of the proposal or with a qualification is a counter-proposal, which must be accepted by the original offeror before a contract is made.

[13] Professor Visu Sinnadurai, a former High Court judge in his book *Law*

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of Contract (4th Ed), Vol 1 (LexisNexis) dealt with the issue of counter offer in the following terms at para 2.19:

> [2.19] Acceptance subject to new terms: counter offer. In certain cases, the courts may consider the purported acceptance that is qualified by the introduction of a new term as a counter offer destroying the original offer. In such cases, where the purported acceptance has been couched in terms suggesting the introduction of a new term, it has been held to be a counter offer. See also the Indian case of *Moolji Jaitha & Co v Seth Kirodimal* and the English case of *British Road Services v Arthur V Crutchley & Co*, *Butler Machine Tool Co Ltd v Ex-Cell O Corp (England) Ltd*; and *Compania de Navegacion Pohing SA v Sea Tanker Shipping (Pte) Ltd, the Buena Trader*.

[14] Thus the introduction of a new term may be considered as a counter offer 'destroying the original offer'. This accords with s 7(a) of the Contracts Act which requires acceptance to be 'absolute and unqualified'. In *Tan Chee Hoe & Anor v Ram Jethmal Punjabi* [1983] 2 MLJ 31 the applicants had merely added the words 'who will hold the same as stakeholders' after the words 'Advani Hoo Morris & Kumar' (the name of the solicitors firm) on the signed acceptance copy of the offer but it was held by the High Court of Singapore that the applicants had introduced a material fresh term which amounted to a counter offer that was not accepted by the respondent. In his judgment Wee Chong Jin CJ cited the following passage in Vol 8 *Halsbury's Laws of England*, (3rd Ed), at p 75:

> In order to constitute acceptance the assent to the terms of an offer must be absolute and unqualified ... If the acceptance is conditional, or any fresh term is introduced by the person to whom the offer is made, his expression of assent amounts to a counter offer, which in turn requires to be accepted by the person who made the original offer.

[15] An offer is made only once. The rest are counter offers. In the context of the present case the proposal is the defendant's offer to sell Lot 20952 to the plaintiff on terms and conditions contained in the draft sale and purchase agreement prepared by the defendant's solicitors. Did the plaintiff accept the proposal without qualification in order to bind the defendant with its offer? On the facts I must say at the outset that the plaintiff's acceptance of the proposal was not absolute as it was conditional upon the defendant agreeing to the new cl 3A. There can be no argument that cl 3A is a material variation from the draft agreement, which at any rate is more substantial than the variation in *Tan Chee Hoe & Anor*.

[16] By introducing the new cl 3A the plaintiff was in fact making a counter offer, thereby reversing its role from being offeree to that of offeror. It was the defendant's call whether to accept the counter proposal, conditionally or absolutely. If the defendant were to accept the plaintiff's counter proposal it

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would be a contract on terms offered by the plaintiff. As the defendant did not accept the counter proposal, it was no longer bound by the terms of the original offer.

[17] The plaintiff's argument that a concluded contract had been created is based on the following authorities: *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 (SC); *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327 (FC); *Cipta Cermat Sdn Bhd v Perbandaran Kemajuan Negeri Kedah* [2007] 2 MLJ 746 (CA). With due respect none of the cases are relevant as they are cases on agreements that are 'subject to contract' where the parties had actually reached consensus ad idem although they had yet to execute a more formal document. It is clear in those cases that contractual relationships were already in existence between the parties. The case of *Lai Kok Kit @ Sulaiman Lai bin Abdullah v MBf Finance Bhd* [2000] 3 MLJ 136 cited by the plaintiff is likewise irrelevant as it is a case on impossibility of performance after execution of the contract. The present case stands on a different footing altogether. It concerns a failure of acceptance, negating the existence of a concluded contract.

[18] In *Malayan Flour Mills Bhd v Saw Eng Chee (administrator of the estate of Saw Cheng Chor, deceased) & Anor* [1997] 1 MLJ 763 Kang Hwee Gee J (as he then was) relying on *Hyde v Wrench* (1840) 3 Beav 334 held on the facts of the case that the counter offer by the plaintiff had diverted the mind of the defendant away from his original offer such that it could legitimately be assumed that he was no longer minded to keep the offer open, the effect of which was the same as if he had withdrawn that offer. Admittedly this case involved a variation in the subject matter of the original offer but the principle in my view is applicable to the factual matrix of the present case as both cases involve a counter offer.

[19] It was further argued that the incorporation of cl 3A was necessary as the property was still encumbranced with several caveats including one by Ambank for a sum of RM4.3m. That may well be the case but it does not alter the fact that since the acceptance of the offer was conditional, no *consensus ad idem* had been reached between the parties. The *animus contrahendi*, ie the intention to be immediately bound by the agreement could only have been formed if the plaintiff had accepted without qualification the defendant's original offer and similarly if the defendant had accepted without qualification the plaintiff's counter offer. In either case the acceptance by either party would convert the offer or the counter offer into a promise and therefore the creation of a valid contract. This process could of course go back and forth between the parties until they reach *consensus ad idem* but the moment one party rejects the last of the counter offers and calls off the negotiation that would be the end of their legal relationship.

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[20] It was finally argued that cl 3A is not a fundamental term and that if the defendant had informed the plaintiff of its disagreement prior to the cancellation the plaintiff would have agreed to withdraw the said cl 3A. I find no substance to the argument. First of all it is incorrect to say that cl 3A is not a fundamental term. It is a material departure from the original terms and conditions set out in the draft sale and purchase agreement. In any event it is immaterial if the new term is fundamental or otherwise as the law requires acceptance to be 'absolute and unqualified'. The acceptance must extend to all terms of the proposal. Adding a new term with a new condition will have the effect of qualifying the acceptance. A term means any provision forming part of a contract: see the *Oxford Dictionary of Law* at p 545. Clause 3A is one such provision.

[21] Secondly the defendant had no duty to inform the plaintiff that it was not agreeable to the new terms. Neither was the defendant obliged to comment on the new terms. It was the plaintiff's duty if at all to obtain the defendant's assent before inserting the proposed cl 3A in the draft sale and purchase agreement. An offeree is not at liberty to add fresh terms to the offer at his whim and fancy. He does so at his own peril. The original offer was therefore revocable at the defendant's option. Thirdly as the defendant's offer had been nullified by the plaintiff's counter offer the contract cannot be revived on original terms by withdrawing the conditional acceptance: Pollock and Mulla.

[22] For reasons aforesaid the plaintiff's claim must be dismissed with costs.

Claim dismissed with costs.

Reported by Afiq Mohamad Noor